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Supreme Court of the United States.

OCTOBER TERM, 1951.

No.

PROVIDENCE FRUIT & PRODUCE BLDG., INC., ET AL.,
Petitioners,
v.
GAMCO INCORPORATED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable, the Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners, Providence Fruit & Produce Bldg., Inc., Telesphore J. Marchant, Nathan Warren, Arthur Hunter, Anthony Mazzatta, Fred J. Rogers, George R. Beane, A. M. Tourtellot Co., Nathan Warren & Sons, Inc., C. S. Mercurio Co., Inc., Felix Rocco Co. and T. A. Boyle Co.,[1] respectfully pray that a writ of certiorari be issued

[1] The petitioners were the defendants in the District Court and the appellees in the Court of Appeals. Since the commencement of this action in May, 1948, the following defendants-appellees have died: Anthony M. Tourtellot, Robert N. Fiske and Garret E. Hollihan.

to review the judgment of the United States Court of Appeals for the First Circuit entered in the above cause on February 13, 1952, which reversed the judgment of the United States District Court for the District of Rhode Island entered for petitioners. A petition for rehearing filed March 6, 1952, was denied on March 17, 1952.

Opinion Below.

The opinion of the United States Court of Appeals for the First Circuit is reported at 194 F. (2d) 484, and the opinion of the United States District Court for the District of Rhode Island is not reported, but is printed in the record at pages 421-441.

Jurisdiction.

The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254 (1).

Introductory Statement.

One of the petitioners, a corporate lessee of a large commercial building, after protracted litigation in the Rhode Island courts,[2] ousted a subtenant, the respondent, for an admitted breach of lease which entitled the landlord to possession.

After the proceedings in the state court were begun by the landlord, the tenant sued the landlord, its board of

[2] The landlord brought trespass and ejectment proceedings against the respondent and obtained a judgment in the District Court. On appeal to the Superior Court the landlord obtained judgment against the respondent and this judgment was affirmed by the Supreme Court of Rhode Island. *Providence Fruit & Produce Building, Inc.*, v. *Gamco Incorporated*, 76 R.I. 54, 68 A. (2d) 20.

directors and five other subtenants of the landlord for alleged violation of the anti-trust laws and unsuccessfully attempted to enjoin the landlord from prosecuting its ejectment proceedings in the state courts.

The District Court made extensive findings of fact and entered judgment for the defendants petitioners. The Court of Appeals stated that it accepted the facts found by the District Court but reversed the judgment, saying that the District Court erred in its application of the law to the facts. However, the Court of Appeals based its judgment on assumed facts in direct conflict with the facts found by the District Court which the Court of Appeals said it accepted.

Statement of the Case.

This case was begun in the District Court in May, 1948.

The District Court found and the Court of Appeals accepted certain findings of fact, which are summarized:

Prior to April, 1929, a corporation organized and owned by the New York, New Haven & Hartford Railroad Company built a large commercial building (herein referred to as the "Building"), about 1000 feet long, at Kinsley and Harris Avenues, Providence, Rhode Island, which was leased under a long-term lease to the petitioner, Providence Fruit & Produce Bldg., Inc. (herein referred to as the "Building Corporation").

The Building was divided into units, each 20 feet wide, consisting of a basement, first and second floors, with platforms in the front and rear. The platforms ran the full length of the building. There were spur tracks in the rear.

At the beginning of this suit there were twenty sublessees (herein referred to as "tenants") in the Building, of which fourteen were in the fruit and produce business, one in

bananas, one in butter and eggs, one in paper and groceries, two restaurants, and one in wholesale beer.

A regulation of the Building Corporation requires a tenant to have at least three units in order to unload a freight car at its rear platform. Seven tenants had this required space. The respondent Gamco, a fruit and produce dealer, was a tenant in the Building and occupied four units.

Among the tenants were four so-called large carlot receivers. No. 1 received in 1948 1208 cars; No. 2, 1004 cars; No. 3, 350 cars and No. 4, 221 cars. The respondent Gamco was No. 3.

The petitioners-defendants (hereinafter called "petitioners") are the Building Corporation, its nine directors (three have died since the beginning of the suit), four large carlot receiver tenants, one small carlot receiver tenant and one no-carlot receiver tenant. Seven tenants in the fruit and produce business were not made defendants, nor were the other six tenants engaged in miscellaneous businesses.

Of the nine directors of the building Corporation four represented the large carlot receivers, and the majority of five represented either small carlot receivers or no-carlot receivers.

There were forty-five shares of stock outstanding, of which fifteen shares were owned by large carlot receivers. Thirty shares were owned by others, some of whom were non-tenants.

From April 5, 1929, to July 8, 1948, applications for leases, subleases, assignments, transfers of interest, etc., were granted, denied or tabled as to both local and out-of-state produce men. The physical limitations of the Building were such that it was necessary to exclude many fruit and produce dealers who desired to become tenants in the Building.

The Building was a favorable market facility in which to engage in the fruit and produce business in the Providence area. However, fruit and produce were bought and sold at the Governor Dyer Market about a mile from the Building. Retailers bought carlots from out-of-state shippers which they unloaded at the freight yard adjacent to the Building. This yard is open to the public and is available to anyone for the purpose of receiving carlots of fruit and produce. There were other places in the immediate vicinity of the Building suitable and available for the conduct of the carlot fruit and produce business, including a building on Terminal Way across the street from the Building, which had spur track facilities and where wholesale businesses were conducted. Gamco was under no compulsion to use the Building. There were other locations and opportunities for Gamco to carry on its fruit and produce business in the Providence area.

Some of the tenants in the Building received fruit and produce in carlots at their rear platforms, by trucks from shippers within and without the state and by trucking fruit and produce from freight cars in the adjacent freight yard. Other tenants received fruit and produce by trucks from shippers within and without the state and by trucking from freight cars. Still other tenants received fruit and produce only by trucks from shippers within and without the state.

The fruit and produce dealers in the Building sold to jobbers, retailers and to each other, and made deliveries directly from freight cars and from their stores in the Building.

The petitioners had no monopoly in the fruit and produce business in the Providence market, nor did they attempt to monopolize this market, nor did they have power or intent to monopolize it. Fruit and produce dealers in the Build-

ing competed with each other, with the dealers in the Governor Dyer Market, and with the independent chain stores which were large carlot receivers. The small dealers bought from the large ones and the large dealers sold to the customers of the small ones. There was a considerable number of failures among the fruit and produce dealers in the Building. There was no community of interest among the petitioners. The petitioners made no attempt to interfere with the conduct of the business of any tenant. The conduct of the petitioners had no effect on prices nor did they have any control over prices of fruit and produce. The prices of fruit and produce sold by the tenants in the Building depended upon the normal economic law of supply and demand. There was keen competition in prices before Gamco became a tenant, during its tenancy and after its eviction.

All leases contained the same provision, including rent per unit and term of one year. Applications for renewal were considered each year and it required a vote of 75% of the Board of Directors to deny a renewal. Thus, the representatives of the large carlot dealers on the Board could not deny the renewal of a tenant's lease. The small carlot receivers and no-carlot receivers were in control of the Board.

Each lease contained a covenant against assigning and subletting, and, if the lessee were a corporation, that it would not permit the sale or transfer of any of its shares without the written consent of the Building Corporation, and for breach of such covenant the lease at the option of the Building Corporation could be terminated.

Gamco, a Rhode Island corporation, was organized in 1946, and became a tenant in the Building in April, 1946. It was a successor to a prior tenant.

From the outset of its business it required financial assistance and secured it from Sawyer & Co., Inc., a dealer

in fruit and produce doing business in Boston, Massachusetts. Gamco's stockholders pledged their stock with Sawyer to secure Gamco's indebtedness to Sawyer, but the stockholders retained their right to vote.

Shortly before September, 1947, stockholders of Gamco transferred a majority of the shares of Gamco to Sawyer without the knowledge or consent of the Building Corporation.

On August 25, 1947, the Board of Directors asked Gamco if its stockholders had transferred any of their shares. On September 4, 1947, Gamco denied that such transfer had been made. This was a false statement.

Several days later Sawyer notified the Building Corporation in writing that a majority of the shares of Gamco had been transferred to it. Thereupon the Board of Directors voted to terminate Gamco's lease because of its breach of covenant, gave Gamco notice to quit and thereafter brought the ejectment proceedings above referred to, which resulted in the ouster of Gamco as a tenant of the Building.

In the District Court Gamco said:

> "The only issue before this court in the instant case is whether or not the defendants by their conduct conspired to kill off competition in violation of the Sherman anti-trust law or even attempted to do so." (R. 437.)

The eviction of Gamco was not a part of a design, plan, policy or conspiracy on the part of the Board of Directors to eliminate Gamco's competition, nor did the petitioners conspire to kill off Gamco's competition. The petitioners had no control of the market nor did they have any power to exclude an outsider who wished to compete therein.

The anti-trust case was an attempt to retry the ejectment case dressed up in the language of the Sherman Act. It

was an attempt by Gamco to secure for itself permanency in the Building. Gamco's eviction stemmed from its violation of its lease.

We reiterate that the foregoing is a fair summary of the facts found by the District Court and accepted by the Court of Appeals.

Question Presented.

Did petitioners violate the Sherman Act when the evidence shows:

(*a*) Petitioners did not monopolize or attempt to monopolize or combine or conspire to monopolize any part of interstate commerce.

(*b*) There was no power and intent of petitioners to exclude competition from a substantial market in interstate commerce.

(*c*) The actions of petitioners had no tendency to affect competition adversely or to control prices, but prices at the Produce Building depended upon the normal law of supply and demand.

(*d*) The provisions of Gamco's lease did not suppress, or tend to suppress, competition or affect prices.

(*e*) Gamco was ousted from the Building for breach of its lease, which breach entitled the landlord to possession. The eviction of Gamco was not a part of a design, plan, policy or conspiracy on the part of petitioners' board to eliminate the competition of out-of-state competitors.

(*f*) The restrictions in the sublease do not directly and substantially regulate commerce.

(*g*) There was no power to exclude Gamco from the fruit and produce market.

(*h*) Petitioners do not have control of the market with the power to exclude an outsider.

(*i*) They ousted Gamco as a tenant of the Building, a favorable market facility, but there were alternative selling sites available and there was a possibility of duplicating the facility.

(*j*) Occupancy in the Building is not a prerequisite for handling fruit and produce in the metropolitan Providence area.

(*k*) Gamco was under no compulsion to use the Building.

(*l*) Petitioners had no control or power to control prices.

(*m*) There was keen competition in prices and petitioners' actions had no effect on prices during or after Gamco's tenancy.

(*n*) There was no community of interest among the petitioners.

(*o*) Petitioners did not conspire to kill off competition.

Statutes Involved.

Sherman Act, sec. 1 (15 U.S.C. sec. 1):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

Sherman Act, sec. 2 (15 U.S.C. sec. 2):

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Reasons for Granting the Writ.

1. The decision of the Court of Appeals is in conflict with *United States* v. *Terminal Railroad Association of St. Louis,* 224 U.S. 383. In that case the basic issue was whether the terminal facilities were indispensable and whether there were other available facilities. In the case at bar the District Court found the Building was merely a favorable facility and that there were other available facilities in the immediate vicinity of the Building. The Court of Appeals accepted this finding. In the *St. Louis Terminal* case the defendants were found to have violated the Act because the facility which they controlled was the only possible means of crossing the Mississippi River at St. Louis open to a railroad. It was, in fact, indispensable to interstate commerce and no substitute was available. The Court of Appeals has determined that exclusion from a favorable or advantageous facility is a violation of the Sherman Act, while the court in the *St. Louis Terminal* case determined that exclusion from a facility which others were compelled to use is the violation.

2. The decision of the Court of Appeals not only misstates the holding of *United States* v. *Associated Press* (D.C. S.D. N.Y.), 52 F. Supp. 362; affirmed, 326 U.S. 1, but stands in direct conflict with that case. The Court of Appeals cited the *Associated Press* case in support of its holding that exclusion from *an appropriate market or business opportunity* was actionable notwithstanding substitute opportunities. In the *Associated Press* case the court found a violation of the Sherman Act by the Associated Press in spite of the existence of United Press and other services, but in that case the court pointed out that, where news was the commodity involved, one news gathering agency was not a substitute for another. The Court of Appeals' interpretation of the *Associated Press* case places

the *Associated Press* case in conflict with the *St. Louis Terminal* case.

3. The decision of the Court of Appeals stands in conflict with the following decisions of this court: *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, and *Standard Oil Co. of California* v. *United States*, 337 U.S. 293. Those cases stand for the proposition that, in order to have a violation of the Act, there must be some form of public injury. No public injury was found in the case at bar nor was there even a suggestion of a public injury. In fact, the District Court found specifically that the petitioners did not control or have the power to control prices, that petitioners' activities had no effect on prices, but that prices in the Building depended upon the normal law of supply and demand and that there was keen competition in the Building.

4. The decision of the Court of Appeals in the case at bar, if permitted to stand, would render nugatory the rule laid down in *United States* v. *Yellow Cab Co.*, 338 U.S. 338. The decision of the Court of Appeals was premised upon three assumed facts:

a. Petitioners' monopoly.
b. Petitioners' power and motive to exclude competition.
c. No adequate justification offered by petitioners for Gamco's ouster.

The Court of Appeals stated that it accepted the findings of the District Court. The trial court, however, found that there was no monopoly, no power or intent of petitioners to exclude competition, and that Gamco was ousted from the building because of a violation of its lease. In view of the findings of the trial court, the opinion of the Court of Appeals is a rejection of the rule laid down in the *Yellow Cab* case.

5. A determination by this court of the correctness of the decision of the Court of Appeals is of importance because, if that decision is permitted to stand, it extends the applicability of the Sherman Act far beyond the decisions of this court. Involved herein is a matter of paramount importance in the administration and application of the Sherman Act.

Wherefore your petitioners pray that this petition be granted and that a writ of certiorari issue.

ANDREW P. QUINN,
FRANK LICHT,
A. PETER QUINN, JR.,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Argument.

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN UNITED STATES v. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, 224 U.S. 383, AND ASSOCIATED PRESS *v.* UNITED STATES, 326 U.S. 1.

In *United States* v. *Terminal Railroad Association of St. Louis,* 224 U.S. 383, the defendants had control of the terminal facilities at St. Louis where the railroads from the eastern and western parts of the country met at the Mississippi River. In order for a railroad to cross the Mississippi at St. Louis it was necessary for it to use the defendants' facilities. Because of the peculiar topographical conditions at St. Louis it was impossible to establish any other terminal facilities, and the court, in fact, so stated at page 397:

> "The result of the geographical and topographical situation is that it is, as a practical matter, *impossible for any railroad company to pass through,* or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company. The averment of the bill that the railroad companies, here defendants, being the sole stockholders of the Terminal Company, as we shall later see, *compel all other railroad companies converging at St. Louis to use the facilities owned and operated by the Terminal Company,* is, therefore, borne out by the facts of the situation." (Italics ours.)

The court further said at page 398:

> "The physical conditions which *compel the use of the combined system* by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, *is the factor* which gives greatest color to the unlawfulness of the combination as now controlled and operated." (Italics ours.)

The Court of Appeals in the case at bar stated that it accepted all the findings by the trial court. Among the facts found by the trial court was the fact that there were other available facilities for carrying on the fruit and produce business in the Providence area. These facilities were realistic alternatives in that they were located in the immediate vicinity and, in fact, were enumerated as follows by the trial justice:

> "Adjacent to the building on the west there is a large tract of land owned by the railroad, and across Harris Avenue from the Building and lying between Harris and Kinsley Avenues there is a large tract of land owned by the City of Providence. On Terminal Way in Providence, which runs between Harris and Kinsley Avenues, there is a group of buildings in front of which are loading platforms and a driveway for trucks, and in the rear of which is a railroad siding." (R. 426.)

> "Yard 17 is open to the public and is available to anyone for the purpose of receiving carlots of fruit and produce, and tenancy in the Produce Building is not a prerequisite for receiving fruit and produce in the Metropolitan Providence area from sources throughout the United States." (R. 430.)

"The plaintiff in the instant case is under no compulsion to use the Produce Building. There are other locations and opportunities for the plaintiff to carry on its fruit and produce business in the Providence area." (R. 439.)

"There is space adjacent to the Produce Building on its west side which might be used for terminal facilities as well as land owned by the City of Providence in the immediate vicinity. There is also space across the street from the Produce Building on Terminal Way which has track facilities, and there are located in said area persons engaged in the wholesale business." (R. 430.)

In making its decision the Supreme Court in the *St. Louis* case stated at page 405:

"It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. *If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact.* The 'physical or topographical condition peculiar to the locality,' which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities." (Italics ours.)

A violation was found in the *St. Louis* case because there the peculiar topographical conditions made it impossible for any outsider to establish other facilities. That this is not so in the case at bar is obvious. The extension of the indispensable facility rule laid down in the *St. Louis* case to facilities which are merely *appropriate or advantageous* is an extension that is not supported by any of this court's decisions and is an application of the Sherman Act to factual situations never before contemplated.

Respondent Gamco in the District Court recognized its burden and sought to prove that the Building was an indispensable facility. On the basis of this it argued that under the *St. Louis* case the petitioners had violated the Sherman Act because of Gamco's exclusion from an indispensable facility. The District Court found that no indispensable facility was involved, and therefore distinguished the instant case from the *St. Louis* case. The Court of Appeals, however, found a violation merely because of the exclusion from an appropriate or advantageous facility. We submit that the District Court's interpretation of the *St. Louis* doctrine was correct.

The decision of the Court of Appeals not only is in direct conflict with the *St. Louis Terminal* decision but also misapplies *United States* v. *Associated Press* (D.C. S.D. N.Y.), 52 F. Supp. 362; affirmed, 326 U.S. 1.

In connection with the *Associated Press* case, the Court of Appeals said:

> "First, as we have indicated, the district court found the possibility of duplicating the physical facilities of the building elsewhere along the line of the New Haven Railroad. We accept this finding. But we do not endorse the assumption that this fact can of itself destroy the illegality of the asserted monopolization. It is clear, from the various cases we have cited above,

> that exclusion from an appropriate market or business opportunity is actionable, notwithstanding substitute opportunities — e.g., the facilities of the United Press in United States v. Associated Press, Supra."

The petitioners submit that in the statement quoted above the court has broadened the scope of the Sherman Act far beyond its intent.

In the *Associated Press* case the government's attack was directed primarily against the by-laws governing admission of members. The Associated Press by-laws threw barriers in the way of new members in a city and field where there was a present member of the Associated Press. This court concluded that the by-laws unlawfully restricted the admission of members and this honorable court affirmed the decision of the three-judge District Court. In reaching its conclusion the District Court, in an opinion by Judge Learned Hand, examined the defendant's contention that Associated Press did not violate the anti-trust laws, because there were other news gathering facilities available, including the United Press and International News Service. In the course of its opinion the District Court pointed out that it was in dispute among the members of the calling "that the service of UP is better than that of AP or vice versa." The District Court then made the following comment on the nature of news, and this comment points up the reason that the defendants' contention was of no avail. The court stated at page 372:

> "In the production of news every step involves the conscious intervention of some news gatherer, and two accounts of the same event will never be the same. Those who make up the first record—the reporters on the spot—are themselves seldom first hand witnesses; they must take the stories of others as their raw ma-

terial, checking their veracity, eliminating their irrelevancies, finally producing an ordered version which will evoke and retain the reader's attention and convince him of its truth. And the report so prepared, when sent to his superiors, they in turn 'edit', before they send it out to the members; a process similar to the first. A personal impress is inevitable at every stage; it gives its value to the dispatch, which without it would be unreadable. So much for those items which actually appear in all the larger news services, and which include all events of major interest. But these are not all: the same personal choice which must figure in preparing a dispatch, operates in deciding what events are important enough to appear at all; and about that men will differ widely; as we often find, when one service 'carries' what others have thought too trivial; or may indeed have missed altogether."

On this aspect of the case, *i.e.*, of the availability of other news gathering facilities and more particularly the UP and INS, which outside of the Associated Press were the largest news gathering agencies active in the country, the court said at page 372:

"For these reasons it is impossible to treat two news services as interchangeable, and to deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have; it is only by crosslights from varying directions that full illumination can be secured."

The essence of what the District Court said is that UP and INS were not "substitute opportunities." They were

not "interchangeable." Because of the nature of news, to have complete coverage it is necessary to have all viewpoints so that one could not be deemed a substitute for another. To further point up the contrast between news and market facilities in this respect seems unnecessary.

At page 18 of this court's opinion in the *Associated Press* case this court said that it was asked to reverse the decision of the lower court "on the ground that the evidence failed to show that AP reports, which might be attributable to their own 'enterprise and sagacity,' are clothed 'in the robes of indispensability.'" On this aspect of the case Associated Press implicitly recognized that its news was not interchangeable, but despite that fact contended that it was not an indispensable facility because the Associated Press made its news available to some publisher or publishers in each city and for that reason the Associated Press news was available everywhere to the reading public. This court stated: "We reject these contentions. The proposed 'indispensability' test would fly in the face of the language of the Sherman Act and all of our previous interpretations of it." The fact that the reading public in each city was able to get the news from a selected publisher or publishers was of no relevance in a consideration of the indispensability test. The controlling facts were that an *indispensable* facility was being monopolized by a select group of publishers to the exclusion of all other publishers.

It is submitted that the *Associated Press* case does not overrule or extend the *St. Louis Terminal* case and that the misapplication of the *Associated Press* case to the facts in the case at bar, *i.e.*, where there is no indispensable facility and there are other available facilities, is, in effect, to rule contra the *St. Louis* decision and the reasoning in the *Associated Press* case.

II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN APEX HOSIERY CO. v. LEADER, 310 U.S. 469, AND STANDARD OIL CO. OF CALIFORNIA v. UNITED STATES, 337 U.S. 293.

There are some activities which are illegal *per se* regardless of the result of the activities or their effect upon competition, upon prices or upon the public generally. Only certain types of action fall within this category, as pointed out in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 522, and *United States* v. *Associated Press* (D.C. S.C. N.Y.), 52 F. Supp. 362, 369. The case at bar obviously does not fall into this class of cases. The result in this case, as in the vast majority of anti-trust cases, must be determined by the application of the rule of reason. *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1. The purpose of the Sherman Act is the protection of the public from the outlawed activities and the cases have recognized the necessity of a public injury before a violation can be established under the rule of reason. The District Court specifically found that in the case at bar the petitioners had no power and no intent to exclude competition from a substantial market in interstate commerce; that Gamco was under no compulsion to use the petitioners' facilities; that there were other realistic locations and opportunities for Gamco to carry on the fruit and produce business in the Providence area; that the petitioners did not control nor did they have the power to control fruit and produce prices in the Providence area; that there was keen competition in prices before Gamco became a tenant, during its tenancy and after its eviction; and that there was no community of interest among the petitioners from which an inference of conspiracy to exclude competition could be drawn. It was on the basis of these findings that the District Court held *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, to be applicable. The District Court relied for support

upon the following language of the *Apex Hosiery* case at page 500:

> "In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *United States* v. *United States Steel Co.*, 251 U. S. 417; *Cement Manufacturers Assn.* v. *United States*, 268 U. S. 588; *United States* v. *International Harvester Co.*, 274 U. S. 693; *Appalachian Coals* v. *United States*, 288 U.S. 344, 375, *et seq.*" (Italics by court.)

The following language from the *Apex Hosiery* case at page 491 further supports the position of the District Court:

> "It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market

by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury."

Standard Oil Co. of California v. *United States,* 337 U.S. 293, also points out the necessity for an effect upon prices or a public injury. This case contrasted sections 1 and 2 of the Sherman Act with section 3 of the Clayton Act. Standard Oil had entered into an exclusive supply contract with independent dealers in the western area. The issue was whether the requirement of showing that the effect of agreements may be to substantially lessen competition might be met simply by proof that a substantial portion of commerce was affected or whether it was necessary to show that competitive activity had actually diminished or would probably diminish. The District Court held that the mere showing of substantial number of outlets and substantial number of contracts was adequate. The foregoing is not pertinent in so far as our case is concerned, since section 3 of the Clayton Act was there involved; but what the court had to say in this connection is germane to the issue under discussion. The Supreme Court, in holding that the District Court was correct under the Clayton Act in not requiring actual proof of lessening of competition, states at page 312:

"It seems hardly likely that, having with one hand set up an express prohibition against a practice thought to be beyond the reach of the Sherman Act, Congress

meant, with the other hand, to reestablish the necessity of meeting the same tests of detriment to the public interest as that Act had been interpreted as requiring."

The lower courts have followed the decisions in the *Apex* and *Standard Oil of California* cases in holding that public injury is prerequisite to a violation of the Sherman Act where the decision is made under the rule of reason. In this connection the language in the following cases is apposite:

United States v. *Associated Press* (D.C. S.D. N.Y.), 52 F. Supp. 362, at 369:

"But these settled instances [reference here being made to violations *per se*] are not exhaustive; they are only illustrations of a general doctrine, whose scope they do not measure. When a situation does not fall within one of them a court is forced to weigh the advantages gained by the combination against the injury done to the public, and apparently in this connection the public is the 'purchasers or consumers' whom the combination will deprive 'of the advantages which they derive from free competition.' Apex Hosiery Co. v. Leader, 310 U. S. 469, 501, 60 S. Ct. 982, 996, 84 L. Ed. 1311, 128 A. L. R. 1044."

Arthur v. *Kraft-Phenix Cheese Corporation* (D.C. D. Md.), 26 F. Supp. 824, at 825:

"It is well established that the principal purpose of enacting the Anti-trust Laws, 15 U.S.C.A. § 1 et seq., was to protect the public; and the right of an individual to sue for personal damages sustained is incidental and subordinate. That is to say, Congress was concerned with preventing activities in interstate commerce which

were prejudicial to the public and therefore the scope of the Act even in authorizing the personal right of private suit by a person particularly injured was only incidental to the main object and the private suits are maintainable only when the defendant's conduct prejudicially affects the public generally as distinct from purely personal or private damage."

The *Apex* and *Standard Oil of California* cases demonstrate that, except in the illegal *per se* cases such as price fixing, the Sherman Act cannot be violated unless there has been some public injury. The findings in the case at bar conclusively show that there was no such public injury or detrimental effect on prices.

The decision of the Court of Appeals stands in direct conflict with the principle laid down in the *Apex* and *Standard Oil of California* cases.

III. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH ADDITIONAL CRITERIA OR TESTS LAID DOWN BY THIS COURT.

Under this heading we set forth in detail the controlling findings made by the District Court. That court found:

1. Petitioners did not monopolize or attempt to monopolize or combine or conspire to monopolize any part of interstate commerce.

2. There was no power and intent of petitioners to exclude competition from a substantial market in interstate commerce.

3. The actions of petitioners had no tendency to affect competition adversely or to control prices, but prices at the Building depend upon the normal law of supply and demand.

4. The provisions of Gamco's lease did not suppress, or intend to suppress, competition or affect prices.

5. Gamco was ousted from the Building for breach of its lease, which breach entitled the landlord to possession. The eviction of Gamco was not a part of a design, plan, policy or conspiracy on the part of petitioners' board to eliminate the competition of out-of-state competitors.

6. The restrictions in the sublease do not directly and substantially regulate commerce.

7. There was no power to exclude Gamco from the fruit and produce market.

8. Petitioners do not have control of the market with the power to exclude an outsider.

9. They ousted Gamco as a tenant of the Building, a favorable market facility, but there were alternative selling sites available and there was a possibility of duplicating the facility.

10. Occupancy in the Building is not a prerequisite for handling fruit and produce in the metropolitan Providence area.

11. Gamco was under no compulsion to use the Building.

12. Petitioners had no control or power to control prices.

13. There was keen competition in prices and petitioners' actions had no effect on prices during or after Gamco's tenancy.

14. There was no community of interest among the petitioners.

15. Petitioners did not conspire to kill off competition.

The Court of Appeals in its opinion made no extensive analysis of the facts, but for the purpose of rendering its opinion merely accepted them.

We submit that there is no case decided by the Supreme Court which would sustain a violation of the Sherman Act based upon the undisturbed findings of the District Court.

An examination of some of the tests or criteria for determining whether or not there has been in a given case a violation of the Sherman Act shows that there was no violation of the Act in the case at bar.

The case of *American Tobacco Co.* v. *United States,* 328 U.S. 781, contains the strictest standards governing the crime of monopolization under section 2 of the Sherman Act. The case, while requiring no actual exclusion, requires only a power and intent to exclude competition or to raise prices. The findings in the case at bar demonstrate that no such power or intent rested in the hands of petitioners.

The *Tobacco* case also suggests that a "community of interest in any industry" provides a natural foundation for working policies favorable to "insiders" and unfavorable to "outsiders." It is noteworthy that in the instant case there was a specific finding by the trial court that no community of interest existed among the petitioners.

In the case of *United States* v. *Aluminum Co. of America* (C.C.A. 2), 148 F. (2d) 416, the court stated that monopoly may have been thrust upon defendants in that case. The Court of Appeals in the case at bar indicated that monopoly was thrust upon the petitioners. It has already been indicated that the District Court specifically found that no monopoly existed among the petitioners. The *Aluminum Co.* case held that in a case where the monopoly had been thrust upon the defendant there must exist a power and intent to monopolize. The findings of the District Court demonstrate that no power or intent to monopolize existed among the petitioners.

In *Standard Oil Co. (Indiana)* v. *United States,* 283 U.S. 163, in the court's determination of whether or not a monopoly existed, the factors most influential to the court were that "no monopoly, or restriction of competition . . . proved" and that "defendants were in active competition among themselves and with other refiners." Such are the

facts in the case at bar. The District Court found that no monopoly or restriction on competition existed and that the petitioners were in competition among themselves and with others in the fruit and produce field.

When the law as stated in the above-cited cases is applied in the case at bar, there is no basis upon which a court could find a violation of the Sherman Act. The petitioners submit that the Court of Appeals in applying the law to the facts was in error and that the decision of the Court of Appeals stands in conflict with all of the above-cited cases.

IV. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN UNITED STATES v. YELLOW CAB CO., 338 U.S. 338.

We deal now with the most confusing aspect of the opinion of the Court of Appeals. Up to this point petitioners have argued on the assumption that the Court of Appeals accepted the findings of the District Court as the Court of Appeals said it did. The Court of Appeals, however, appears to have based its decision upon three assumed facts: (1) Petitioners were a monopoly; (2) Petitioners had the power and the motive to exclude competition; (3) Petitioners offered no adequate justification for their actions.

In contrast to the facts assumed by the Court of Appeals the District Court found specifically as follows:

> 1. "The credible testimony does not convince me that the defendants monopolized or attempted to monopolize nor that they combined or conspired to monopolize any part of interstate commerce in violation of Sec. 2 of the Sherman Act." (R. 437.)
>
> 2. "There was no power and intent on their part to exclude competition from a substantial market in interstate commerce." (R. 437.)

"In the instant case, the defendants do not have control of the market with power to exclude an outsider who wishes to compete therein." (R. 441.)

3. "Gamco's eviction stemmed from a violation of its lease." (R. 441.)

In *United States* v. *Yellow Cab Co.*, 338 U.S. 338, Rule 52 of the Federal Rules of Civil Procedure was considered and the Supreme Court said at page 341:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends."

As illustrative of the manner in which the Court of Appeals, although stating that it accepted the findings of the District Court, appeared to reject the findings of that court is the position of the Court of Appeals with respect to the so-called requirement of justification. It is submitted that, in view of the findings of the trial court, petitioners justified Gamco's ouster. Evidence was introduced in the District Court establishing the reason for Gamco's eviction, which reason was Gamco's breach of the terms of its lease. The trial court accepted this evidence. The Court of Appeals in speaking of justification said that, since no justification was offered, it must hold the exclusion unjustified.

The District Court, having listened to the testimony and passed upon the credibility of witnesses, found that there

was justification for Gamco's ouster under the lease, yet the Court of Appeals must have disbelieved or overlooked petitioners' reasons for ouster in order to find no justification. In reaching its conclusion, the Court of Appeals either passed upon a question of credibility and believed Gamco's witnesses rather than petitioners' witnesses, or overlooked the findings of the District Court on this question. The question of credibility under Rule 52, as construed in the *Yellow Cab* case, is within the province of the District Court.

The position of the Court of Appeals in the case at bar is inherently self-contradictory. The Court of Appeals took the position that it accepted the facts but reversed the District Court because, it said, the District Court misapplied the law. If the Court of Appeals actually accepted the findings of fact of the District Court, as it says it did, then the Court of Appeals' conclusions of law, as we have already argued, are in conflict with the decisions of this court with respect to an alleged violation of the Sherman Act. If the Court of Appeals ignored the findings of the District Court, although it said it accepted them, the Court of Appeals would be definitely in conflict with the rule laid down in the *Yellow Cab* case. In either event, the opinion of the Court of Appeals is in conflict with decisions of this court.

V. The Court of Appeals has decided an important question of federal law which has not been but should be settled by this court.

Every action taken by the Building Corporation after its first letter to Gamco on August 25, 1947, until the final adjudication by the Supreme Court of Rhode Island was taken because of Gamco's breach of its lease, false state-

ments to and defiance of the Board of Directors of the Building Corporation.

First, the Building Corporation had been advised of the transfer of Gamco's stock to Sawyer without the knowledge and consent of the Building Corporation and without any request by Gamco for permission to make such transfer, and second, while Sawyer was in control of Gamco, Gamco on September 4, 1947, falsely denied the transfer to Sawyer.

If the Building Corporation had permitted Gamco thus to conduct itself in violation of its promises and legal obligations and then to attempt to conceal the true facts by false statements, the Building Corporation would have lost complete control of its tenants. Gamco's action, if permitted to stand, takes the right of selection of successor tenants from the Building Corporation.

The Court of Appeals in its opinion ignored Gamco's breach of its lease and required the Building Corporation to justify Gamco's eviction by some other business reasons, such as lack of available space in the Building, financial unsoundness or possibly low or unethical standards.

We submit that the Building Corporation required no better reason to commence eviction proceedings against Gamco than the fact that Gamco violated the provisions of its lease. There is no decided case which permits a tenant deliberately to violate an important covenant in its lease, to make false written statements to the lessor in an attempt to conceal its wrongdoing, and then, having been declared a trespasser by the court of last resort of its state, to ask a federal court to put it back in possession and then to collect damages because of an alleged breach by the landlord of the anti-trust laws.

With respect to this matter the District Court said:

> ". . . the instant action is an attempt by the plaintiff to secure for itself (or its transferee) permanency in

the Produce Building; that Gamco's eviction stemmed from a violation of its lease." (R. 441.)

The Court of Appeals said that it accepted the above finding of fact. Under the circumstances the decision of the Court of Appeals permits the impairment of a substantial contractual right of the Building Corporation.

This application of the anti-trust law by the Court of Appeals will have a drastic effect upon the ordinary law of landlord and tenant. To ask the landlord to justify the ouster of a tenant by producing certain other business reasons in addition to a well-founded legal reason is to establish a new concept in the law of landlord and tenant, and it is, we submit, an application of the anti-trust law not heretofore sanctioned.

Conclusion.

For the reasons stated in the petition and in this brief, the application for a writ of certiorari should be granted.

Respectfully submitted,

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